or is it beyond a reasonable doubt? Does the person accused have any chance to give any kind of a defense? These are all issues that should be laid out.

If we are going to use military tribunals, let's make sure we are putting forth the best face of America. We have so much for which to be proud. We have a great deal to be proud of in our civil courts and in our military courts. At a time when we are asking nations around the world to join us in our battle against these despicable acts of terror—the acts we saw on September 11 in New York, the Pentagon, and in a lonely field in Pennsylvania—as we properly and appropriately defend ourselves and seek to eradicate the source of this terror, let's make sure, as we line up countries around the world to join us in that battle, that we keep those countries as our allies for further battles. Even after bin Laden is gone—and eventually he will be—there will be other terrorists—if not now, in later years. We want to make sure that countries join with us in the battle against terrorism, respecting the fact that we uphold our Constitution and our highest ideals as Americans.

THE CONTINUING DEBATE ON THE USE OF MILITARY COMMISSIONS

Assistant Attorney General Chertoff testified on November 28 before the Senate Judiciary Committee that ''the history of this Government in prosecuting terrorists in domestic courts has been one of unmitigated success and one in which the judges have done a superb job of managing the courtroom and not compromising our concerns about security and our concerns about classified information.''

I am proud that the Senate Judiciary Committee is playing a role in sponsoring this national debate, and I appreciate the participation and contributions of all members of the committee—no matter their point of view. Leading constitutional, civil rights and military justice experts have generously shared their time and analyses with the committee, as well as the Attorney General and other representatives of the Department of Justice. No one participant, no one person, and no one party holds a monopoly on wisdom in this Nation. I know that spirited debate is a national treasure. I know what the terrorists will never understand, that our diversity of opinion is not a weakness but a strength beyond measure.

I do not cast aspersions on those who disagree with my views on this subject. I do not challenge their motives and seek to cower them into silence with charges of ''fear mongering.'' I challenge their ideas, and praise them as patriots in a noble cause.

Already, our oversight has provided a better picture of how the administration intends to use military commissions. According to William Safire of the New York Times, Secretary of Defense Donald Rumsfeld called the discourse over military commissions ''useful'' and is reaching outside the Pentagon for input. It now appears that the administration is reconsidering some of the most sweeping terms of the President's November 13 military order. On its face, that order has broad scope and provides little in the way of procedural protections, but the more recent assurances that it will be applied sparingly and in far narrower circumstances than is suggested by the language of the order have been helpful. While the Judiciary Committee hearings were ongoing, the administration clarified its plans for implementation of the military order in five critical aspects.

First, as written, the military order applies to non-citizens in the United States, which according to testimony before the committee would cover about 20 million people. Two days after we began our series of hearings, the President's counsel indicated that military commissions would not be held in the United States, but rather ''close to where our forces may be fighting.'' Anonymous administration officials have also indicated in press reports that there is no plan to use military commissions in this country but only for those caught in battlefield operations.

Second, the White House counsel has also indicated that the order will only apply to ''non-citizens who are members or active supporters of al-Qaida or other international organizations targeting the United States'' and who are ''chargeable with offenses against the international laws of war.''

Third, while the military order is essentially silent on the procedural safeguards that will be provided in military commission trials, the White House counsel has explained that military commissions will be conducted like courts-martial under the Uniform Code of Military Justice. I have great confidence in our courts-martial system, which offers protections for the accused that rival, and in some cases even surpass, protections in our Federal civilian courts and includes judicial review.

Fourth, nothing in the military order would prevent commission trials from being conducted in secret, as was done, for example, in the case of the eight Nazi saboteurs that has most often been cited by the administration as its model for this order. However, Mr. Gonzales assured us that ''Trials before military commissions will be as open as possible, consistent with the urgent needs of national security.'' Mr. Chertoff's testimony before the committee was along the same lines.

This is in sharp contrast to the statements before our hearings that the ''proceedings promise to be swift and largely secret, with one military officer saying that the release of information might be limited to the barest facts, like the defendant's name and sentence.''

Finally, the order expressly states that the accused in military commissions ''shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly . . . in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.'' Yet, the administration's most recent statements are that this is not an effort to suspend the writ of habeas corpus.

These explanations of the military order by both anonymous and identified administration representatives suggest that, one, the administration does not intend to use military commissions to try people arrested in the United States; two, these tribunals will be limited to ''foreign enemy war criminals'' for ''offenses against the international laws of war''; three, the military commissions will follow the rules of procedural fairness used for trying U.S. military personnel; and four, the judgments of the military commissions will be subject to some form of judicial review. We hope that the Attorney General's responses to written questions from the committee will continue to clarify these critical matters.

The administration apparently contends that an express grant of power from this Congress to establish military commissions is unnecessary. The Attorney General testified before the Judiciary Committee on December 6 that, ''the President's power to establish war-crimes commissions arises out of his power as Commander in Chief.'' A growing chorus of legal experts casts doubt on that proposition, however. Nevertheless, the administration appears to be adamant about going it alone and risking a bad court decision on the underlying legality of the military commission. Why take a chance that the punishment meted out to terrorists by a military commission will not stick due to a constitutional infirmity in the commission's jurisdiction?

I have received a letter signed by over 400 law professors from all over the country, expressing their collective wisdom that the military commissions contemplated by the President's Order are ''legally deficient, unnecessary, and unwise.'' More specifically, these hundreds of legal scholars point out that Article I of the Constitution provides that Congress, not the President, has the power to ''define and punish . . . Offenses against the Law of Nations.'' Absent specific congressional authorization, they say, the order ''undermines the tradition of the Separation of Powers.''

At our last hearing with the Attorney General, some of my colleagues on the other side of the aisle suggested that the administration had ''essentially won'' the argument on military commissions. This impression is wholly mistaken and I would urge my colleagues to review the record of the hearings before the Senate Judiciary Committee on this issue.

This debate is not about following the polls and playing a game of political ''gotcha'' when the cameras are rolling. When more than 400 law professors speak with one voice, and anyone who has been to law school knows that it is no easy matter to get even two law professors to agree on something, we must carefully consider their opinion that there are serious legal and constitutional problems with the President's course of action.

Their views are consistent with the concerns raised by the constitutional and military justice experts who testified before the committee. Let me just cite a few examples.

Retired Air Force Colonel Scott Silliman and law professor Laurence Tribe argued that the legal basis of the President's Military Order is weak and should be remedied by Congress.

Cass Sunstein of the University of Chicago recommended that basic requirements of procedural justice be met if commissions are established.

Neal Katyal of Yale Law School opined that the order ''usurps the power of Congress'' and ignores the focus of our Constitution's framework.

Kate Martin, Director of the Center for National Security Studies states that the military order ''violates separation of powers as the creation of military commissions has not been authorized by the Congress and is outside the President's constitutional powers.'' She compares this current situation to that ''[w]hen the Supreme Court approved the use of military commissions in World War II'' and ''Congress has specifically authorized their use in Articles of War adopted to prosecute the war against Germany and Japan.''

Phillip Heymann of Harvard Law School testified that he regards the Military Order ''as one of the clearest mistakes and one of the most dangerous claims of executive power in the almost fifty years that [he has] been in and out of government.''

Kathleen Clark of Washington University Law School, St. Louis, in submitted testimony, examines each of the four sources cited by the President for authority for the order and concludes, ''None of these authorize the creation of this type of military tribunal.'' She concludes that ''In this time of uncertainty and fear, it is as important as ever for Congress to ensure that the executive branch abides by the constitutional limits on its authority.''

Timothy Lynch, Director of the CATO Institute's Project on Criminal Justice contends that ''because Article I of the Constitution vests the legislative power in the Congress, not the Office of the President, the unilateral nature of the executive order clearly runs afoul of the separation of powers principle.''

Legal experts around the country are concerned that the President's order does not comport with either constitutional or international standards of due process. As pointed out in the letter from over 400 law professors, this defect has both practical and legal consequences. Legally, it means that the order may be inconsistent with our treaty obligations, which under our Constitution are the ''supreme Law of the Land.'' Practically, it give political cover to those less democratic regimes around the world to mistreat foreign defendants in their courts, and thereby places Americans around the world at risk.

On December 5, I forwarded to the Attorney General in advance of the Judiciary Committee hearing proposed legislation to authorize the President to establish military tribunals to try terrorists captured abroad in connection with the September 11 attacks. In that proposal I outlined a number of procedural safeguards to fulfill the President's command in his military order for a ''full and fair hearing.'' These procedures would bring these tribunals into compliance with our Nation's obligations under international law and treaties to which the United States is a party.

The authorization for and literal terms of the order present serious questions and require some corrective action. That is why I have offered to work with the administration and other members to draft and pass legislation that will clearly authorize and establish procedures for military commissions.

Those of us who take an oath of office to uphold the Constitution, both in the Congress and the administration, have a duty to do more than just listen to the polls. The important thing, after all, is not who wins some political debate the important thing is that America gets this right.

I ask unanimous consent to have the law professors' letter dated December 5, 2001, and an outline of safeguards and the sources for them be printed in the RECORD.

DECEMBER 5, 2001.

Hon. PATRICK J. LEAHY,

Chairman, Senate Judiciary Committee, Russell Senate Office Bldg., U.S. Senate, Washington, DC.

DEAR SENATOR LEAHY: We, the undersigned law professors and lawyers, write to express our concern about the November 13, 2001, Military Order, issued by President Bush and directing the Department of Defense to establish military commissions to decide the guilt of non-citizens suspected of involvement in terrorist activities.

The United States has a constitutional court system of which we are rightly proud. Time and again, it has shown itself able to adapt to complex and novel problems, both criminal and civil. Its functioning is a worldwide emblem of the workings of justice in a democratic society.

In contrast, the Order authorizes the Department of Defense to create institutions in which we can have no confidence. We understand the sense of crisis that pervades the nation. We appreciate and share both the sadness and the anger. But we must not let the attack of September 11, 2001 lead us to sacrifice our constitutional values and abandon our commitment to the rule of law. In our judgment, the untested institutions contemplated by the Order are legally deficient, unnecessary, and unwise.

In this brief statement, we outline only a few examples of the serious constitutional questions this Order raises:

The Order undermines the tradition of the Separation of Powers. Article I of the Constitution provides that the Congress, not the President, has the power to ''define and punish . . . Offenses against the Law of Nations.'' The Order, in contrast, lodges that power in the Secretary of Defense, acting at the direction of the President and without congressional approval.

The Order does not comport with either constitutional or international standards of due process. The President's proposal permits indefinite detention, secret trials, and no appeals.

The text of the Order allows the Executive to violate the United States' binding treaty obligations. The International Covenant on Civil and Political Rights, ratified by the United States in 1992, obligates State Parties to protect the due process rights of all persons subject to any criminal proceeding. The third Geneva Convention of 1949, ratified by the United States in 1955, requires that every prisoner of war have a meaningful right to appeal a sentence or a conviction. Under Article VI of the Constitution, these obligations are the ''supreme Law of the Land'' and cannot be superseded by a unilateral presidential order.

No court has upheld unilateral action by the Executive that provided for as dramatic a departure from constitutional norms as does this Order. While in 1942 the Supreme Court allowed President Roosevelt's use of military commissions during World War II, Congress had expressly granted him the power to create such commissions.

Recourse to military commissions is unnecessary to the successful prosecution and conviction of terrorists. It presumes that regularly constituted courts and military courts-martial that adhere to well-tested due process are unable to handle prosecutions of this sort. Yet in recent years, the federal trial courts have successfully tried and convicted international terrorists, including members of the al-Qaeda network.

It is a triumph of the United States that, despite the attack of September 11, our institutions are fully functioning. Even the disruption of offices, phones, and the mail has not stopped the United States government from carrying out its constitutionally-mandated responsibilities. Our courts should not be prevented by Presidential Order from visibly doing the same.

Finally, the use of military commissions would be unwise, as it could endanger American lives and complicate American foreign policy. Such use by the United States would undermine our government's ability to protest effectively when other countries do the same. Americans, be they civilians, peacekeepers, members of the armed services, or diplomats, would be at risk. The United States has taken other countries to task for proceedings that violate basic civil rights. Recently, for example, when Peru branded an American citizen a ''terrorist'' and gave her a secret ''trial,'' the United States properly protested that the proceedings were not held in ''open civilian court with full rights of legal defense, in accordance with international judicial norms.''

The proposal to abandon our existing legal institutions in favor of such a constitutionally questionable endeavor is misguided. Our democracy is at its most resolute when we meet crises with our bedrock ideals intact and unyielding.

Respectfully submitted,

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Peter J. Spiro, Professor of Law, Hofstra University Law School; Joan Steinman, Distinguished Professor of Law, Chicago-Kent College of Law; Barbara Stark, Professor of Law, University of Tennessee College of Law; Margaret Stewart, Professor of Law, Chicago-Kent School of Law; Katherine Stone, Professor of Law, Cornell Law School; Victor J. Stone, Professor Emeritus of Law, University of Illinois at Urbana-Champaign; Robert N. Strassfeld, Professor of Law, Case Western Reserve University School of Law; Peter L. Strauss, Betts Professor of Law, Columbia Law School; Beth Stephens, Associate Professor of Law, Rutgers-Camden School of Law; Ellen Y. Suni, Professor of Law, University of Missouri-Kansas City School of Law; Michael Sweeney, Esq., Eleanor Swift, Professor of Law, School of Law (Boalt Hall), University of California at Berkeley; David Taylor, Professor of Law, Northern Illinois College of Law; Kim Taylor-Thompson, Professor, New York University School of Law; Peter R. Teachout, Professor of Constitutional Law, Vermont Law School; Harry F.

Tepker, Calvert Chair of Law and Liberty and Professor of Law, University of Oklahoma; Beth Thornburg, Professor of Law, Dedman School of Law, Southern Methodist University; Lance Tibbles, Professor of Law, Capital University Law School; Mark Tushnet, Georgetown University Law Center; Kathleen Waits, Associate Professor, University of Tulsa College of Law; Neil Vidner, Duke University Law School; and Joan Vogel, Professor of Law, Vermont Law School.

Rhonda Wasserman, Professor of Law, University of Pittsburgh School of Law; Mark Weber, Professor of Law, DePaul University College of Law; Harry H. Wellington, Sterling Professor of Law Emeritus, Yale Law School, Professor of Law, New York Law School; Carwina Weng, Assistant Clinical Professor, Boston College Law School; Jamison Wilcox, Quinnipiac School of Law; Cynthia Williams, Associate Professor, University of Illinois College of Law and Visiting Professor Fordham University Law School; Verna Williams, Assistant Professor of Law, University of Cincinnati College of Law; Harvey Wingo, Professor Emeritus of Law, Southern Methodist University; Stephen L. Winter, Professor of Law, Brooklyn Law School; Zipporah B. Wiseman, Thomas H. Law Centennial Professor of Law, University of Texas; Stephen Wizner, William O. Douglas Clinical Professor of Law, Yale Law School; Arthur D. Wolf, Professor of Law, Western New England College School of Law; Richard Wright, Professor of Law, Chicago-Kent College of Law; Larry Yackle, Boston University School of Law; Professor Ellen Yaroshefsky, Jacob Burns Ethics Center, Cardozo Law School, Yeshiva University; and Karen Kithan Yau, Robert M. Cover Clinical Teaching Fellow, Yale Law School and Member of the Connecticut, Massachusetts and New York State Bars.

PROCEDURAL SAFEGUARDS FOR MILITARY TRIBUNALS

(i) That the tribunal is independent and impartial—Sources: Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol II) Part II, Art. 6, No. 2; International Covenant on Civil and Political Rights (ICCPR), Part III, Art. 14, No. 1; Universal Declaration of Human Rights (UDHR), Art. 10.

(ii) That the particulars of the offense charged or alleged against the accused are given without delay—Sources: Protocol II, Part II, Art. 6, No. 2(a); ICCPR, Part III, Art. 14, No. 3(a) and (c); Statute of the International Criminal Tribunal for former Yugoslavia (ICTY), Art. 20(3), 21(4)(a); Additional Protocol I to the Geneva Conventions (Protocol I), Art. 75(4)(a); U.S. Rules of Courts-Martial (RCM) 308; RCM 405(f)(1), (2), and (6); and RCM 602.

(iii) That the proceedings be made intelligible by translation or interpretation—Sources: ICCPR, Part III, Art. 14, No. 3(a) and (f); ICTY, Art. 21(4)(a) and (f); Geneva Convention 3, Art. 105; Implicit in Protocol I, Art. 4(a).

(iv) That the evidence supporting the conviction is given to the accused, with exceptions only for demonstrable reasons of national security or public safety—Sources: ICCPR, Part III, Art. 14, No. 1; Geneva Convention 3, Art. 105; Protocol I, Art. 75(4)(g); Universal Declaration of Human Rights, Art. 11; ICTY 21(4)(e); RCM 308; RCM 405(f)(3) and (5); RCM 405(g)(1)(B); RCM 703(f); Military Rules of Evidence (MRE) 401.

(v) That the accused has the opportunity to be present at trial—Sources: Protocol II, Part II, Art. 6, No. 2(e); ICCPR, Part III, Art. 14, No. 3(d); ICTY, Art. 21(4)(d); Implicit in Geneva Convention 3, Art. 99; Protocol I, Art 75(4)(e); RCM 804.

(vi) That the accused may be represented by counsel—Sources: ICCPR, Part III, Art. 14, No. 3(b) and (d); ICTY, Art. 21(4)(b) and (d) implicit in Protocol II, Part II, Art. 6, No. 2(a); RCM 405(d)(2); RCM 405(f)(4); RCM 506.

(vi) That the accused has the opportunity to respond to the evidence supporting conviction and present exculpatory evidence—Sources: ICCPR, Part III, Art. 14, No. 3(e); Geneva Convention 3, Art. 105; RCM 405(f)(10) and (11).

(vii) That the accused has the opportunity to cross-examine adverse witnesses and to offer witnesses—Sources: ICCPR, Part III, Art. 14, No. 3(e); ICTY, Art. 21(4)(e); Geneva Convention 3, Art. 105; Protocol I, Art. 75(4)(g); Universal Declaration of Human Rights, Art. 11; RCM 405(f)(8) and (9); RCM 703(a); MRE 611(b).

(viii) That the proceeding and disposition are expeditious—Sources: ICCPR, Part III, Art. 14, No. 3(c); ICTY, Art. 20(1), Art. 21(4)(c); implicit in Protocol II, Part II, Art. 6, No. 2(a); Geneva Convention 3, Art 105; Additional Protocol 1 to the Geneva Conventions, Art. 75(4)(g); UDHR, Art. 11; RCM 707(a) (calls for arraignment within 120 days).

(ix) That reasonable rules of evidence, designed to ensure admission only of material with probative value, are used—Sources: This is a suggestion made by Cass Sunstein in testimony before the Judiciary Cmte on 12/4/2001; it responds to section 4(c)(3) of the President's military order; see also Geneva Convention 3, Art 103; Protocol I, Art. 75(4)(a); MRE 401–403 (NOTE: protections are nearly equal to safeguards in federal civilian courts).

(x) That before and after the trial, the accused is afforded all necessary means of defense—Sources: Protocol II, Part II, Art. 6, No. 2(a); ICCPR, Part III, Art. 14, No. 3(b).

(xi) That conviction is based only upon proof of individual responsibility for the offense—Sources: Protocol II, Part II, Art. 6, No. 2(b); ICTY, Art. 21(4)(b); Geneva Convention 3, Art. 105.

(xii) That conviction is not based upon acts, offenses or omissions which were not offenses under the law at the time they were committed—Sources: Protocol II, Part II, Art. 6, No. 2(c); UDHR, Art. 11(2); ICTY, Art 7; Protocol I, Art. 75(4)(b).

(xiii) That the penalty for an offense is not greater than it was at the time that the offense was committed—Sources: Protocol II, Part II, Art. 6, No. 2(c); UDHR, Art. 11(2); ICTY, Art. 10; ICCPR, Art. 15; Protocol I, Art. 75(4)(c).

(xiv) That the accused is presumed innocent until proved guilty—Sources: Protocol II, Part II, Art. 6, No. 2(d); ICCPR, Part III, Art. 14, No. 2; Art. 15; UDHR, Art. 11(1); ICTY, Art. 21(3); Protocol I, Art. 75(4)(c).

(xv) That the accused is not compelled to confess guilt or testify against himself—Sources: Protocol II, Part II, Art. 6, No. 2(f); ICCPR, Part III, Art. 14, No. 3(g); ICTY, Art. 21(4)(g); RCM 405(f)(7); MRE 301; Implicit in Geneva Convention 3, Art 99; Protocol I, Art. 75(4)(d).

(xvi) That the trial is open and public, including public availability of the transcripts of the trial and pronouncement of judgment, with exceptions only for demonstrable reasons of national security or public safety—Sources: ICCPR, Part III, Art. 14, No. 1; ICTY,. Art. 20(4) and 21(2); Protocol I, Art. 75(4)(f); RCM 806; RCM 922; RCM 1007.

(xvii) That a convicted person is informed of remedies and appeals and the time limits for the exercise thereof—Sources: Protocol II, Part II, Art. 6, No. 3; ICCPR, Part III, Art. 14, No. 5; UDHR, Art. 10, 11; Protocol I, Art. 75(4)(i); RCM 1010.

(xviii) That a convicted person is informed of remedies and appeals and the time limits for the exercise thereof—Sources: Protocol II, Part II, Art. 6, No. 3; ICCPR, Part III, Art. 14, No. 5.; Geneva Convention 3, Art 106; Protocol I, Art. 75(4)(j) [to be informed if available]; UDHR, Art. 14; ICTY, Art 25.

Mr. LUGAR. Mr. President, I want to take advantage of the presence of the distinguished Senator from Vermont and the present chairman of the Agriculture Committee, who are the sole survivors of the agriculture debate today. This may be indicative of the kind of stamina required for this work.

It would be my hope to proceed in morning business to, in fact, give a statement about national security. I ask the Chair informally, because he has had a very long week, and I had not anticipated that he would be assuming this responsibility—nor do I wish to take advantage of that—if I may, I would like to proceed in morning business.

The PRESIDING OFFICER (Mr. HARKIN). Without objection, it is so ordered.

NATIONAL SECURITY

Mr. LUGAR. Mr. President, I found in the current issue of the National Journal a very important article entitled ''Nuclear Nightmares,'' by James Kitfield, who has written knowledgeably in the past about matters of national security, and particularly those involving nuclear energy and weapons of mass destruction.

I want to place this article by James Kitfield into the RECORD. I ask unanimous consent that it be printed in the RECORD.

There being no objection, the Article was ordered to be printed in the RECORD, as follows:

[From the National Journal, Dec. 14, 2001]

NUCLEAR NIGHTMARES

(By James Kitfield)

The recent disclosure that documents about nuclear bombs and radiological ''dirty bombs'' had been found at captured Al Qaeda terrorist network facilities in Kabul, Afghanistan, immediately triggered alarms among the nuclear scientists who work atop the high desert mesas in this remote region of New Mexico. For more than 50 years, nuclear experts at Los Alamos and at nearby Sandia National Laboratories have studied terrorist and criminal groups for any signs that they were on the verge of cracking the nuclear code first broken here. Everything they knew about Al Qaeda told them that these terrorists might be drawing too close to a terrible discovery.

Indeed, ever since members of the Manhattan Project tested the first atomic bomb in New Mexico in 1945, scientists at Los Alamos have been the pre-eminent keepers of the nuclear flame. When the former Soviet Union created the secret nuclear city ''Arzamas-16'' as the birthplace of its own atomic bomb, it hewed closely to the Los Alamos blueprint. So much so, in fact, that Russian residents later jokingly referred to their town as ''Los Arzamas.''

Almost from the inception of the nuclear age, no one understood better the apocalyptic threat of these weapons than the nuclear scientists who made them. J. Robert Oppenheimer, the director of the Manhattan Project and the father of the atomic bomb, eventually feel out of favor with the U.S.